

Resolution No. 16-431
Introduced: January 22, 2008
Adopted: January 22, 2008

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: County Council

SUBJECT: APPLICATION NO. G-861 FOR AMENDMENT TO THE ZONING ORDINANCE MAP,
Cindy Bar, Attorney for Applicant Keating Development Company, OPINION AND
RESOLUTION ON APPLICATION

Tax Account Nos. 00435988, 00435955, 00435990

OPINION

Application No. G-861, filed on November 15, 2006 by Applicant Keating Development Company, requests reclassification from the C-4 Zone (limited commercial) to the PD-44 Zone (Planned Development, 44 dwelling units per acre) of 2.5 acres of land located at 7001 Arlington Road, Bethesda, Maryland, in the 7th election district. The property is identified as Parcels N826, P828 and P795 on Tax Map HN122.

As required under the PD Zone, the application was accompanied by a Development Plan with detailed specifications related to land use, density, development standards and staging. Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone.

The Hearing Examiner found that the proposed Development Plan is not in substantial compliance with the applicable sector plan, does not fully comply with the purposes, standards and regulations of the PD-44 Zone and does not provide for a form of development that will be compatible with adjacent development. Finding, further, that it may be possible for the Applicant to design a building that will implement the combination of uses proposed here while more closely complying with the Sector's Plan's recommendations and creating a compatible relationship with surrounding land

uses, the Hearing Examiner recommended a remand of the application to provide the Applicant with the opportunity to revise its plans.

The Montgomery County Planning Board (the "Planning Board") and its Technical Staff both recommended approval of the subject application, finding that the proposed development would be compatible with the surrounding area, would be consistent with the purposes and standards of the zone and would be consistent with the recommendations of the applicable Master Plan. The Planning Board's recommendation was not, however, unequivocal. The transmittal letter included a recommendation from the Planning Board Chair that because of "the potential conflicts in traffic and vehicular movement for this project" on Arlington Road, the District Council should view the development plan "as illustrative rather than binding, so that the potential vehicular movement related issues can be thoroughly examined and resolved at site plan." Ex. 39 at 2. The District Council finds it impossible to follow this recommendation, because doing so would leave an inadequate basis for the District Council to make the findings required of it under Section 59-D-1.61 of the Zoning Ordinance.

The District Council agrees with the Hearing Examiner's conclusions and incorporates her Report and Recommendation of December 24, 2007 herein.

The subject property consists of approximately .5 acres of land located at 7001 Arlington Road, Bethesda, in a C-4 Zone, between Bethesda Avenue to the north and Bradley Boulevard to the south. The site is roughly a parallelogram in shape, with about 277 feet of frontage on Arlington Road, and approximate depths of 487 feet along its northern property line and 423 feet along its southern property line. The site is nearly entirely paved, and is developed with a United States Postal Service ("Postal Service") facility, a large parking lot and an entrance driveway. The elevation rises about ten feet from the southwest corner of the site to the northeast corner. Vegetation is limited to a small lawn area with ornamental trees on the west side of the building, and several areas on the north and east sides of the parking lot with scrub vegetation. The site has no forest, streams, wetlands or specimen and significant trees.

The surrounding area for this application consists of the area roughly bounded by Hampden Lane to the North, Woodmont Avenue and the Sacks residential neighborhood to the east, Bradley Boulevard to the south and Fairfax Road/Clarendon Road to the west.

The surrounding area is predominantly commercial in nature, containing a mix of uses. To the north and south, the subject property abuts commercial properties in the C-2 Zone: a Goodyear Tire and Auto Facility and an Ourisman Honda auto dealership to the north, and to the south an office/retail complex with a one-story building and a five-story parking garage closest to the subject site, plus two five-story buildings. To the east, the subject property abuts the Capital Crescent Trail (the "Trail"), a 90-foot-wide public right-of-way containing a paved walking/biking trail, which Technical Staff from the Park Development Division at MNCPPC describes as "a much used and cherished recreational amenity." See Memorandum dated March 13, 2007, Attachment 8 to Staff Report. In the vicinity of the subject site, the Trail consists of a 10-foot-wide asphalt path and a three-foot-wide, parallel, stone edge path, as well as a landscaped seating area with benches and a water fountain. On the east side of the Trail is a community of single-family, detached homes known as the Sacks neighborhood, classified under the R-60 Zone. The Applicant's land planner describes this community as "a unique pocket of detached single-family dwellings surrounded by denser commercial and residential uses in an urban, mixed-use extension of the Bethesda Central Business District." Ex. 35(a) at 2. Across Arlington Road from the subject site is the Bradley Shopping Center in the C-2 Zone, which contains a variety of retail establishments including a hardware store, a variety store, a drug store and a delicatessen. The subject site is within 600 feet of the Bethesda Central Business District and approximately 1,800 feet from the Bethesda Metro Station.

The subject property was classified under the I-2 Zone (Heavy Industrial) in the 1958 County-wide comprehensive rezoning. The record does not reflect precisely when the property was rezoned to the C-2 Zone, but the C-2 zoning was confirmed by Sectional Map Amendment in 1972 (SMA F-736) and 1994 (SMA G-711).

The Applicant proposes to redevelop the subject site with a mix of uses in a single building: an expanded Postal Service facility on the ground level, four stories of multi-family residential dwellings above it, and two levels of underground parking. The new postal facility would have 7,000 square feet of retail post office space fronting on Arlington Road (a substantial increase over the current 1,000-square-foot retail space) and 23,000 square feet of Postal Service work space. The residential component would have a maximum of 111 multi-family units, including 12.5 percent Moderately Priced Dwelling Units ("MPDUs"). The maximum building height along Arlington Road would be 63.5 feet. The Postal Service work space, parking and loading area would all be underground, beneath the residential units, and therefore the associated trips and activity levels would not be visible to site residents, Trail users or residents of the Sacks neighborhood. The exterior wall of the garage would be partially visible from the Trail, as it would sit several feet above the ground, but photographic evidence and the Applicant's stated intention to enhance landscaping along the Trail edge suggest that the building wall would be at least partly screened by plantings.

The front of the proposed building is intended to sit at the edge of a wide, pedestrian-friendly, urban sidewalk. The Postal Service facility would have a single story with an 18-foot clearance, to conform to Postal Service design requirements. The full 18 feet would be above ground along Arlington Road, but would be partially underground at the east end of the site, due to the change in elevation, and would have the appearance of being mostly underground due to planned terraces and landscaping. The Postal Service facility would serve as a platform for the four-story residential portion of the building and its extensive terraces. The residential portion of the building would cover a roughly Z-shaped portion of the postal facility roof, with two short wings parallel to Arlington Road and the Trail, and a longer wing connected on the diagonal. The rest of the postal facility roof would be covered by landscaped terraces intended to comply with the PD Zone requirement that 50 percent of the site be occupied by green area. The terraces would be common space for building residents, and would be accessible from the first floor of the residential building. Staircases would provide access for building residents from the terraces to the residential lobby, the street and the Trail, although these access

points would be closed to the public. The main entrance to the residential portion of the building would be at ground level, at the southern end of the site's Arlington Road frontage.

Staff in the Park Development Division at the Maryland-National Capital Park & Planning Commission described the features proposed for the east side of the building as a series of terraced gardens, and recommended that if the development goes forward, all walls, fencing, walkways and ramps facing the Trail should be carefully designed by a landscape architect as a public amenity for the thousands of users of the Trail. The evidence indicates an intention on the Applicant's part to comply with these recommendations, with the details to be worked out during site plan review. As shown on the submitted *plans*, it appears that the view from the Trail – which is intended to be screened by plantings along the Trail edge – would be of a six-foot high wall about two feet from the property line; then a landscaping strip about 12 feet deep, sloping up from six feet above the ground to about 14 feet above the ground; then the edge of the terrace level about 14 feet from the property line (perhaps with the tops of taller plantings visible from the ground); and finally the four-story residential portion of the building, which would sit about 14 feet above ground level, stepped back to a distance 30 feet from the property line.

One of the most significant issues in this case has been the circulation plan, which needs to accommodate four traffic flows on a busy street: post office customers, Postal Service trucks of various sizes, Postal Service employees' private vehicles and building residents. The Applicant proposes to designate the existing driveway entrance, at the north end of the site's Arlington Road frontage, for Postal Service vehicles and post office customers, who would park in separate areas on the upper level of the parking garage. Due to the site topography and the location proposed for customer parking, near the front of the site, postal customers would park essentially at grade, while the parking would move below grade farther back (east) on the site. The retail post office would be at ground level, accessible on foot from Arlington Road or underground from the customer parking area.

The Applicant proposes a second driveway entrance at the south end of the site's Arlington Road frontage, to be designated for building residents and Postal Service employees. This

entrance is shown with special paving and a circular drop-off area, in addition to the garage entrance. Residents and employees would park in separate areas on the lower level of the parking structure. The preliminary parking count provides for 290 spaces, well above the 224 required under the Zoning Ordinance, but the Applicant may request a ten percent reduction from the standard parking requirements (under Code Section 59-E-3.33) due to the site's proximity to Metro.

Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. This development plan must contain several elements, including a land use plan showing general locations of site access, locations and uses of all proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas and the number of spaces, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. As a general matter, the development plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual. The site plan approved by the Planning Board later in the process must conform to all non-illustrative elements of the development plan approved by the District Council. See Code § 59-D-1.2.

The principal component of the Development Plan in this case, Exhibit 94(a), shows the approximate location proposed for the building, parking areas and access points. It specifies several textual binding elements, which are items the Applicant wished to make definite, but were more readily expressed in text than in the graphics. These are set forth on the following page:

Textual Binding Elements from Development Plan, Ex. 94(a)**BINDING ELEMENTS:**

1. THE BUILDING WILL HAVE A MAXIMUM HEIGHT OF 63.5', AS MEASURED FROM THE BUILDING HEIGHT MEASURE POINT IN THE CENTERLINE OF ARLINGTON ROAD, WHOSE ELEVATION IS 306.64, AND AS SHOWN ON THE DEVELOPMENT PLAN.

2. THE DEVELOPMENT WILL HAVE A MAXIMUM DENSITY OF 1.66 FAR.

3. THE MAXIMUM NUMBER OF MULTI-FAMILY DWELLING UNITS TO BE CONTAINED IN THE BUILDING SHALL NOT EXCEED 111.

4. THE BUILDING SHALL INCLUDE 12.5% OF THE FINAL UNIT COUNT AS MODERATELY PRICED DWELLING UNITS.

5. THE DEVELOPMENT WILL PROVIDE A MINIMUM OF 50% GREEN AREA ON SITE.

6. AS PART OF THE SITE PLAN PROCESS FOR THE 7001 ARLINGTON ROAD PROJECT, THE SIGNALIZATION PROPOSED IN THE DEVELOPMENT PLAN MUST BE APPROVED BY DPWT, INCLUDING LANE GEOMETRY AND THE PROVISION OF NECESSARY RIGHTS OF WAY OR EASEMENT ASSURANCES ON THE WEST SIDE OF ARLINGTON ROAD. PRIOR TO APPLICATION FOR THE BUILDING PERMIT FOR CONSTRUCTION OF THE BUILDING THE FINAL DESIGN FOR THE SIGNAL MUST BE APPROVED. PRIOR TO ISSUANCE OF THE BUILDING PERMIT THE SIGNAL MUST BE PERMITTED AND BONDED, AND PRIOR TO THE ISSUANCE OF OCCUPANCY PERMITS THE SIGNAL MUST BE OPERATIONAL.

7. THE BUILDING WALLS, EXCLUSIVE OF ROOF OVERHANGS, CORNICES, BALCONIES, PATIOS, TERRACES, UNDERGROUND PARKING GARAGES AND SIMILAR APPURTENANCES, WILL HAVE A MINIMUM 30 FOOT SETBACK FROM THE EASTERN PROPERTY LINE.

The District Council finds that the Development Plan submitted with this application does not satisfy all the requirements for a development plan under Code §59-D-1.61(a)-(e). Each of the required findings is addressed below.

§59-D-1.61(a): consistency with use and density indicated in the sector plan. The proposed development may be considered generally consistent with the Sector Plan's suggestion that one acceptable use for this site would be a combination of multi-family dwellings and neighborhood-serving retail. While dissenting views were expressed on this point during the hearing, the District Council agrees with the Hearing Examiner's conclusion that at least the retail post office portion of the proposed development can be considered neighborhood-serving retail, and that the Sector Plan's

concern about compatibility of the post office facility with an on-site residential use did not foresee that residential dwellings could be protected from the noise and bustle of Postal Service operations by being located above the postal facility, with a total separation between the two.

The Sector Plan recommended a residential density very similar to that proposed by the Applicant: 105 dwelling units recommended v. 111 units proposed. The three-percent increase proposed by the Applicant is a minor difference, and the total remains below the maximum number of units that would be permitted under the recommended PD-44 zoning, based on the gross tract area of the site. Density must also be considered, however, taking the commercial space into account. The Sector Plan suggested that under a mixed-use residential/commercial scenario, an appropriate combination would be 105 dwelling units plus 40,000 square feet of commercial space. The Applicant proposes roughly that number of dwellings units plus 30,000 square feet of Postal Service space, 25 percent less than recommended. However, it appears that the Postal Service's ceiling requirement and extensive parking needs result in a building that is significantly larger than would normally result from the recommended commercial density, resulting in a non-residential density more intense than the Sector Plan intended. Accordingly, the District Council concludes that the proposed development would be substantially consistent with the use recommended in the Sector Plan but not with the recommended density.

Section 59-D-1.61(a) requires a finding by the Alternative Review Committee before a zoning application can be approved with a height or density exceeding applicable master plan recommendations, if the excess height or density is needed to accommodate MPDUs. Here, the Applicant proposes a building height and density that exceed the recommendations of the Sector Plan, but the basis for this request is to accommodate the needs of the Postal Service, not MPDUs. The District Council agrees with the Hearing Examiner and Technical Staff that a finding by the Alternative Review Committee is necessary only where a request to exceed the master plan recommended height or density is due to MPDUs. See Ex. 46. Accordingly, Alternative Review Committee consideration was not required in this case.

The evidence supports the conclusion that the Development Plan does not conflict with any other county plans or policies, or the capital improvement program. It would further county housing policy by creating additional housing options near the Bethesda Metro, including about twelve affordable units, and would be consistent with the applicable Growth Policy.

§59-D-1.61(b): purposes of the zone; safety, convenience and amenity of residents; and compatibility with adjacent development.

1. The Purpose Clause

The purpose clause for the PD Zone contains a number of goals and objectives, some of which are satisfied by this application and some of which are not. The District Council's findings as to each paragraph of the purpose clause are set forth below.

First paragraph: Master Plan implementation. The first paragraph of the purpose clause establishes consistency with the master plan as an important factor in applying the zone. As discussed under 59-D-1.61(a) above, the proposed development would not be in substantial compliance with the density recommended in the Master Plan. The proposal also fails to substantially comply with the general character of development recommended in the Sector Plan. Where the Sector Plan recommends redevelopment with significant open space, a substantial setback from the eastern property line and building heights no greater than four stories, the Applicant has proposed a building that would cover virtually the entire site, with very little ground-level setback, and building heights reaching the equivalent of five to six stories.

The proposed redevelopment would be consistent with the Sector Plan's vision of street-front, neighborhood-serving retail uses along Arlington Road, sitting right on the sidewalk, and would improve pedestrian circulation by providing wider, more attractive sidewalks. This constitutes partial compliance with the general character the Sector Plan sought for the area, but it is not enough.

The Applicant and Technical Staff suggest that the proposed development should be permitted because there are five-story buildings immediately north and south of this site that sit closer to the Trail than the building shown on the Development Plan. One could argue that under these

circumstances, there is no point in requiring compliance with the more open character envisioned by the Sector Plan, that it's too late, a different character has already been established in the area. One could alternatively argue, as stated by a community member, that the presence of five-story structures on either side of this site makes it all the more valuable to have a smaller building and deeper setback on the subject site, to let some sunshine into the Trail.

Technical Staff provided a lukewarm endorsement for the proposed development, stating that staff "does not find four floors incompatible," and suggesting that the structure should be set further back than shown on the Development Plan to provide space for a better vegetative buffer. See Staff Report at 5. Staff also acknowledged that structures to the north and south of the site "present 50 to 60 feet of unscreened structure at the property line with the trail, which in staff's view is much more visually disruptive than the proposed project." See *id.* In the District Council's view, the fact that other structures have been permitted adjacent to the Trail that may have adverse impacts on the Trail and the adjoining neighborhood is a slim justification for approving a Development Plan that is significantly inconsistent with the Sector Plan.

The Planning Board also provided only a lukewarm endorsement for the proposed development, couched in a recommendation from the Chair that the proposal should be considered illustrative, to allow the Planning Board to resolve potential problems at site plan review.

Based on the preponderance of the evidence, the District Council finds that the proposed Development Plan would not substantially comply with the recommendations of the Sector Plan and therefore cannot be approved in its current form. The District Council recognizes, however, that it may be possible for the Applicant to design a building that will implement the combination of uses proposed here while following more closely the Sector Plan's recommendations regarding building form and lot coverage. This may require sacrificing some residential density. With a design that provides more ground-level open space, greater ground-level setbacks and a lower building height along the Trail, the combined postal facility/multi-family building could be a positive step in implementing the Sector Plan's vision for the Arlington Road District. To provide for this possibility, this resolution will

remand the application to the Hearing Examiner to reopen the record for additional submissions by the Applicant.

Second paragraph: social and community interaction, distinctive visual character, balanced mixture of uses. The proposed development would encourage social and community interaction by creating a large, common terrace area where building residents would have the opportunity to come together. The Development Plan also provides for access from the site to the Trail and the many amenities of downtown Bethesda, which would provide opportunities for site residents to interact with other community members taking part in downtown activities or using the Trail. The store-front post office and second-story terraces would give the building a distinctive visual character, and the continued post office function with new residential units would add to the diverse blend of residential, commercial, private and public uses in Bethesda.

Third paragraph: broad range of housing types. This development would increase the stock of multi-family housing available in downtown Bethesda and create a new, desirable housing option on Arlington Road.

Fourth and fifth paragraphs: trees, grading and open space. The subject site is virtually bereft of trees or other vegetation. The proposed Development Plan would create little green area on the ground, but would have a large, outdoor terrace at the second floor level that would be a significant green amenity for building residents. As the District Council has observed in other PD Zone cases, the language encouraging open space that benefits the community at large applies more readily to large sites, where significant open spaces may be available as quasi-public areas, than to a small, infill site such as the one at issue here, where shared public space is less practical. In this case, the large, landscaped terrace proposed in this case would be a visual amenity for people on the upper floors of nearby office buildings, expanding the green space in their view shed.

Sixth paragraph: pedestrian networks. This paragraph also applies more readily to a large site with multiple buildings. Nonetheless, the Development Plan here provides pedestrian and vehicular linkages from Arlington Road to the post office and the main residential entrance, as well as

pathways linking the residences to the large, landscaped terrace and the Capital Crescent Trail. All of this, as well as the site's location in downtown Bethesda, near countless shops, restaurants and other activities accessible within a short walk, would encourage pedestrian activity. The Development Plan would further encourage pedestrian activity by improving the sidewalk along the site frontage, improving pedestrian access to the post office and installing a traffic light that would provide a better sense of security for pedestrians crossing Arlington Road. The traffic light could even be a deciding factor for some people as to whether they drive from the post office to the Bradley Shopping Center, or leave their cars in place and walk a short distance.

Seventh paragraph: scale. The PD Zone encourages, but does not require, development on a large scale.

Eighth paragraph, first part: safety, convenience and amenity. The evidence demonstrates that the proposed development would provide a high degree of safety, convenience and amenity for site residents, with a convenient downtown location, and on-site amenities including a landscaped terrace. It would also provide an amenity for area residents generally, by greatly improving pedestrian and vehicular access to the post office.

Eighth paragraph, second part: compatibility. The evidence does not fully support a finding that the proposed development would be compatible with the surrounding area. The combination of uses would be compatible, with the retail post office complementing existing retail uses on Arlington Road, and the multi-family use acting, as suggested in the Sector Plan, as a good transition use between the Sacks neighborhood and the surrounding commercial center. It also should be noted that the visual appearance of the subject site would be greatly improved by putting the large Postal Service parking and loading area underground. Nonetheless, placing the building so close to the Trail, even with a 30-foot setback starting at the second-floor level, would result in a relationship that the District Council considers incompatible. As Technical Staff suggested, a compatible relationship could be better established with a greater setback, which would allow larger trees to be planted along the Trail property line for screening purposes. Pulling the underground garage back from

the property line could also reduce the potential for damage to trees already existing in the Trail right-of-way.

Technical Staff observed correctly that the proposed building would be less incompatible with the Trail and nearby homes than the existing buildings immediately to the south and north, which sit slightly closer to the Trail and have little screening. In the District Council's view, however, the proper test is whether the use and building proposed in this case would be a compatible addition to the surrounding area, with a particular view to protecting the most sensitive nearby uses. This is a judgment call, in the crowded, diverse environment of the subject site, but on balance, the District Council does not consider the relationship of the proposed building to the Trail and the nearby homes to be compatible.

Ninth paragraph: three findings. The purpose clause states that the PD Zone "is in the nature of a special exception," and shall be approved or disapproved based on three findings:

- (1) the application is or is not proper for the comprehensive and systematic development of the county;
- (2) the application is or is not capable of accomplishing the purposes of this zone; and
- (3) the application is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

Based on the preponderance of the evidence and for the reasons stated above, the District Council concludes that the present application is neither proper for the comprehensive and systematic development of the County nor in substantial compliance with the Sector Plan, and would accomplish most but not all of the purposes of the zone.

2. Standards and Regulations of the Zone

The standards and regulations of the PD-44 Zone are summarized below, together with the grounds for the District Council's conclusion that the proposed development would satisfy the applicable requirements.

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, "no land can be classified in the planned development zone unless such land is within an area for which there is an

existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher." The subject property is recommended in the Master Plan for residential development at a density of up to 44 units per acre, so this requirement is satisfied.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The subject application satisfies the first of these criteria, which states the following:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

The subject property contains sufficient gross area to permit the construction of 111 dwelling units.

Section 59-C-7.131, Residential Uses. All types of residential uses are permitted, but parameters are established for the unit mix. A PD-44 development with less than 200 units may, as proposed here, consist of 100 percent multi-family units.

Section 59-C-7.132, Commercial Uses. Commercial uses indicated on the applicable master plan are permitted in the PD Zone. The District Council will follow the Hearing Examiner, Technical Staff and the Applicant in addressing the proposed postal service facility as a commercial use, which is clearly considered appropriate in the Sector Plan as an existing, community-serving use.

Section 59-C-7.133, Other Uses. No uses are proposed other than the postal service facility and residential use.

Section 59-C-7.14, Density of Residential Development. The Zoning Ordinance provides the following direction for the District Council in considering a request for the PD Zone (§ 59-C-7.14(b)):

The District Council must determine whether the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or sector plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide [MPDUs], and such other information as may be relevant.

The Zoning Ordinance classifies the density category applied for, PD-44, as a high-density planned development zone, which may be appropriate in an urban area. It is, moreover, the residential density recommended for the subject site in the Sector Plan. The incompatibility and lack of Sector Plan

compliance found by the District Council are not a result of the density category sought, but of the proposal to combine that density with the needs of the Postal Service.

Section 59-C-7.15, Compatibility. This section requires that a proposed development be compatible internally and with adjacent uses. It also establishes minimum parameters for setbacks and building height that are designed to promote compatibility. Despite the District Council's finding that the proposed development would not be compatible with existing development in the surrounding area, the specific setback and building height provisions must be analyzed. They are set forth below.

Section 59-C-7.15(b) reads as follows:

(b) In order to assist in accomplishing compatibility for sites that are not within, or in close proximity to a central business district or transit station development area, the following requirements apply where a planned development zone adjoins land for which the area master plan recommends a one-family detached zone:

(1) No building other than a one-family detached residence can be constructed within 100 feet of such adjoining land; and

(2) No building can be constructed to a height greater than its distance from such adjoining land.

The District Council agrees with the Hearing Examiner's conclusion that Section 59-C-7.15(b) does not apply to the subject site because by its terms, it is intended "to assist in accomplishing compatibility *for sites that are not within, or in close proximity to a central business district*" (emphasis added). The Applicant maintains that the subject property is in close proximity to the Bethesda CBD, as it sits within 600 feet of the CBD boundary. The People's Counsel argues that "close proximity" requires more than just "proximity," that word having been modified by "close," which implies nearness or adjacency. He finds it to be evident that the subject property is not within "close proximity" to the CBD. The Montgomery County Civic Federation similarly argues that in this context "close proximity" means "adjacent." See Ex. 99. The Applicant reports that Technical Staff, in contrast, considers all properties within the Sector Plan area to be within close proximity to the CBD. The District Council finds that on this point, Technical Staff and the Applicant have the better argument. The language of Section 59-C-7.15(b)

applies to all potential applications of the PD Zone, anywhere in the County. Viewed in the context of the County as a whole, a site that is a few hundred feet from a CBD can readily be considered in close proximity to it. This language is intended to distinguish areas that are quite close to a CBD, where residents should expect commercial uses nearby, from areas with no CBD in sight, where residents may expect a higher degree of privacy, quiet and residential setting. Accordingly, the District Council is persuaded that Section 59-C-7.15(b) does not apply to the subject site.

Section 59-C-7.16, Green Area. The PD-44 Zone requires a minimum of 50 percent green area. The Development Plan depicts green area satisfying this requirement, which consists primarily of the terrace and the sidewalk along Arlington Road. The Applicant argues, and Technical Staff agrees, that the second-floor terrace qualifies as “green area” even though it would sit on the roof of a building – the postal facility. The Montgomery County Civic Federation argues that “green area” should be located at ground level, rather than allowing the same piece of ground to qualify both as part of a building footprint and as “green area.” The Zoning Ordinance defines “green area” as follows:

Green area: An area of land associated with and located on the same tract of land as a major building or group of buildings, or a prescribed portion of the land area encompassed by a development plan, diagrammatic plan or site plan, to which it provides light and air, or scenic, recreational or similar amenities. This space must generally be available for entry and use by the occupants of the building or area involved, but may include a limited proportion of space so located and treated as to enhance the amenity of the development by providing landscaping features or screening for the benefit of the occupants or those in neighboring areas, or a general appearance of openness. Green area may include but is not limited to lawns, decorative plantings, sidewalks and walkways, active and passive recreational areas including children's playgrounds, public plazas, fountains, swimming pools, wooded areas, and watercourses. Green area does not include parking lots or vehicular surfaces, accessory buildings other than swimming pools, or areas of open space so located, small, or circumscribed by buildings, parking or drainage areas as to have no substantial value for the purposes stated in this paragraph.

The Planning Board and its staff, as well as the Applicant's land planner, interpret this definition to include areas on rooftops. Technical Staff explained that although the definition begins with “an area of land,” it goes on to cite examples of what is and is not included in green area, and does not explicitly exclude rooftop terraces. Staff viewed the landscaped terrace in this case as providing benefits to site residents as well as neighboring areas, and within the scope of the “green area” definition. Staff

notes that the District Council approved a development plan amendment (DPA 06-1) on April 24, 2007 that provided for nearly half the green area on the penthouse level.

The District Council is not bound to perpetuate an error, should it find that a previous legal interpretation is incorrect. However, the Planning Board has long been the agency charged with determining how terms such as "green area," "open space" and "public use space" will be applied. The District Council in this instance defers to the administrative practice and professional judgment of the Planning Board and its staff.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools and other public uses must be dedicated to public use, with such dedications shown on all required development plans and site plans. The Development Plan shows the sole dedication, consisting of additional right-of-way along Arlington Road.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. The Development Plan in this case provides for more than the required number of spaces. Technical Staff confirms that the Zoning Ordinance requirement for parking would be met.

The final two elements of finding (b), the maximum safety, convenience and amenity of the residents, and compatibility, have already been addressed.

§59-D-1.61(c): safe, adequate and efficient internal vehicular and pedestrian circulation systems. Considerable anecdotal evidence was presented about traffic safety on this stretch of Arlington Road. Visibility from the many driveway openings on this part of the road is limited by a hill and a curve, particularly for the southern driveway proposed on the subject site and for the Bradley Shopping Center, both of which are directly on the curve. Hearing participants testified that the curve makes it difficult for drivers exiting the post office or the shopping center to see oncoming traffic. Opposition witnesses question whether the proposed development would improve traffic circulation and pedestrian safety (one of the Sector Plan's objectives for the Arlington Road District) or would make a bad situation worse.

Technical Staff found that the driveway designs are adequate and that the separation of residential parking from post office customers and truck traffic is adequate and appropriate. Staff "could not find any reason to believe that the proposed design of the access points is inadequate or unsafe." *Id.*

The Applicant's traffic planner testified that the new circulation pattern would be a big improvement over current conditions, where retail customers share the same driveway and parking areas with Postal Service trucks, Postal Service employees and loading docks used by large trucks. Under current conditions, moreover, customers arriving on foot must walk down the drive aisle and around the parking lot to reach the entrance to the retail post office. Under the proposed Development Plan, separate parking areas would be provided for each type of traffic, retail customers could reach the building without having to negotiate past any trucks, and pedestrians would have direct access from Arlington Road. Building residents would also have the convenience of a circular drop-off area at the residential entrance, avoiding the need for vehicles to stop on Arlington Road to drop off or pick up a passenger.

The northern driveway would be slightly wider than the existing one, but in essentially the same location. This location is about 50 feet from the driveway entrance for the Goodyear facility adjacent to the north, which is less than the 100-foot driveway spacing preferred by the Department of Public Works and Transportation ("DPWT"). However, DPWT has approved a driveway spacing exception to permit the new post office driveway in the same location.

The southern driveway would not provide adequate sight distance to the left for exiting vehicles, due to the curve in the road. To resolve this problem, the Applicant proposes to install a traffic signal, which would control the proposed southern entrance to the subject site and the main entrance to the Bradley Shopping Center. According to DPWT, as long as the new driveway has a "no right turn on red" designation, the normal sight distance requirement would not apply if there is a traffic signal in place. Installing a traffic signal on Arlington Road would require approval from DPWT. Based on a traffic signal warrant study prepared by the Applicant, DPWT has agreed that weekend shopping center

traffic meets the side street warrant criteria for a traffic signal. DPWT notes that other factors must be addressed before a final approval for signalization can be given, including the removal of the current left-turn restriction at the existing shopping center driveway, the shopping center driveway design, and the likelihood that signal equipment on the west side of Arlington Road would need to be placed outside the existing public right-of-way. Therefore, DPWT's final approval would require further detailed engineering layout and signal design, and procurement of necessary rights of way or easements, as is the County's standard process at the site plan/permit stage.

The Applicant has added a binding element to the Development Plan in response to language suggested by DPWT, with input from the principal hearing participants and the Hearing Examiner. It reads as follows:

6. AS PART OF THE SITE PLAN PROCESS FOR THE 7001 ARLINGTON ROAD PROJECT, THE SIGNALIZATION PROPOSED IN THE DEVELOPMENT PLAN MUST BE APPROVED BY DPWT, INCLUDING LANE GEOMETRY AND THE PROVISION OF NECESSARY RIGHTS OF WAY OR EASEMENT ASSURANCES ON THE WEST SIDE OF ARLINGTON ROAD. PRIOR TO APPLICATION FOR THE BUILDING PERMIT FOR CONSTRUCTION OF THE BUILDING THE FINAL DESIGN FOR THE SIGNAL MUST BE APPROVED, PRIOR TO ISSUANCE OF THE BUILDING PERMIT THE SIGNAL MUST BE PERMITTED AND BONDED, AND PRIOR TO THE ISSUANCE OF OCCUPANCY PERMITS THE SIGNAL MUST BE OPERATIONAL.

This binding element includes language (1) to place the onus on the Applicant not to apply for a building permit until the traffic signal has been approved; and (2) to ensure that the building will not be occupied and generating traffic until the signal is actually operational. The Applicant has provided a very strong assurance that if the zoning is approved, the building will not be constructed unless the traffic signal receives final approval from DPWT, and it will not be occupied until the signal is in use. Any changes to those conditions would require a development plan amendment approved by the District Council.

The People's Counsel, Martin Klauber, argued that the present application should be denied, in part because the Applicant presented no evidence concerning how Arlington Road would operate with the new traffic signal in place. Mr. Klauber questioned whether, for example, the traffic signal would cause additional back-ups during the weekday peak hours. See Tr. Aug. 1 at 128-29.

The Applicant's traffic expert opined that the proposed traffic signal would improve traffic conditions along this stretch of Arlington Road by providing safe movements in and out of the shopping center and the new driveway on the subject site, and would create gaps in traffic that would make queues more manageable. In addition, as several witnesses pointed out, a traffic signal at the proposed location was recommended in the Sector Plan. The Montgomery County Civic Federation argued that the Sector Plan recommended the traffic signal in conjunction with straightening the curve in the road. However, the Applicant's civil engineer testified that one can be done without the other.

The Applicant's traffic planner provided a well-reasoned professional opinion that the traffic signal would improve conditions on Arlington Road. Absent specific evidence to the contrary, the District Council is persuaded by this opinion, as well as the Sector Plan recommendation in favor of a mid-block traffic signal, that the proposed traffic signal is likely to improve traffic conditions in the area. Accordingly, the District Council does not consider this issue to be a basis to deny or remand this application. The District Council would nonetheless welcome additional, more specific evidence on remand regarding how the traffic signal would improve conditions on this stretch of Arlington Road.

Mr. Klauber and Mr. Humphrey also argued that the Applicant should not be permitted to rely on the proposed traffic signal because it is not "reasonably probable of fruition in the foreseeable future," a standard that is commonly applied in the Maryland courts. See *Montgomery County v. Greater Colesville Citizens Association*, 70 Md. App. 374 (1987). They observed that there has been no comment on the traffic signal from the owner of the Bradley Shopping Center, and that there is no certainty about DPWT approval. Given these uncertainties, Mr. Klauber questions whether the traffic signal binding element can really be considered binding.

The traffic signal is not a certainty, but in the District Council's estimation, the preponderance of the evidence indicates that it is reasonably probable of fruition in the foreseeable future. The County's planners recommended it, DPWT has agreed that the traffic volumes warrant a signal, and the Applicant is prepared to pay the full cost. The binding element does not guarantee that the traffic signal will be built, but it does guarantee that, if the rezoning is granted, the proposed building

will not be constructed unless the traffic signal receives final DPWT approval, nor will it be occupied unless the traffic signal is put into operation, unless the Applicant comes back to the District Council for a development plan amendment. The District Council does not consider this issue to be a basis to deny or remand this application, but would welcome evidence on remand concerning whether the owner of the Bradley Shopping Center would be willing to cooperate in obtaining approval for and installing a traffic signal.

§59-D-1.61(d): preservation of natural features. The proposed development would tend to minimize grading by taking advantage of the site topography to put part of the building underground. The site is virtually bereft of trees or other natural features, and the minimal forest conservation requirement would be easily satisfied. The Applicant's engineer testified persuasively that quantity and quality stormwater management controls to be placed in the parking garage would satisfy applicable requirements and improve the present situation.

§59-D-1.61(e): common area maintenance. The Applicant has not provided any draft documents of this nature. However, the Applicant's hearing representative, Frank Poli, testified that if this development goes forward, the ultimate ownership configuration will ensure that landscaping is maintained on site in perpetuity. See Tr. Aug. 1 at 11.

In addition to the five development plan findings, the District Council also must consider the relationship of the present application to the public interest. When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment.

The Planning Board and Technical Staff concluded that the proposed development would substantially comply with the recommendations and objectives of the *Bethesda CBD Sector Plan*. The District Council disagrees, and therefore finds that approval of the rezoning and Development Plan as currently proposed would not be in the public interest.

The Applicant's submitted traffic study demonstrates that the proposed development would not cause critical lane volume ("CLV") at any of the studied intersections to exceed the congestion standard established for the relevant policy area.¹ Technical Staff agreed with this conclusion, as did the Hearing Examiner, after weighing it against evidence submitted by community members concerning traffic back-ups on Arlington Road. The traffic study showed post-development CLVs well below the applicable congestion standard of 1,800 during the weekday peak periods, and even on a busy Saturday. The preponderance of the evidence indicates that the accident rate involving pedestrians, a key concern expressed by community members, is fairly low for a busy street. Moreover, the Hearing Examiner's informal application of the queuing analysis standards provided in the Local Area Transportation Review Guidelines suggests that the existing back-ups on Arlington Road are within norms that are considered acceptable in a central business district. Accordingly, the District Council concludes that the preponderance of the evidence indicates the proposed development would have no adverse effects on traffic conditions, in light of the Applicant's commitment not to even seek a building permit until the proposed mid-block traffic signal has received final approval from DPWT.

The evidence indicates that utilities are readily available, and that forest conservation and stormwater management regulations would be satisfied. With regard to public schools, the District Council finds that the expected minor addition to overcrowding at Bethesda Elementary School, which is not sufficient to prevent development under either the 2003-2005 or the 2007-2009 Growth Policy standards, does not warrant denial of the requested rezoning.

The Sector Plan plays a central role in the purpose clause for the PD Zone, so in this context its recommendations and objectives are entitled to particular deference. Having found that the proposed development, as depicted on the submitted Development Plan, would not be consistent with

¹ As discussed in the Hearing Examiner's report on pages 47-48, the Council Resolution enacting the current 2007-2009 Growth Policy, which was adopted on November 13, 2007, expressed a clear intent not to apply the new Growth Policy to subdivision applications filed before January 1, 2007, and that intent may be applied to zoning cases as well. Accordingly, the District Council applies the standards under the 2003-2005 AGP Policy Element, which was in effect when this application was submitted.

the Sector Plan, the District Council concludes that approval of the application in its current form would not be in the public interest. The District Council finds, however, that reclassification of the subject property to the PD-44 Zone with an appropriate development plan could be a valuable addition to Arlington Road and therefore in the public interest.

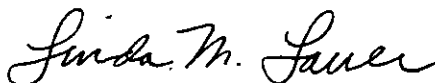
For these reasons, the application will be remanded to the Hearing Examiner in the manner set forth below.

ACTION

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-861, requesting reclassification from the C-4 Zone (limited commercial) to the PD-44 Zone (Planned Development, 44 dwelling units per acre) of 2.5 acres of land located at 7001 Arlington Road, Bethesda, Maryland, in the 7th Election District, is hereby remanded to the Hearing Examiner with instructions to reopen the record, to provide the Applicant with the opportunity to revise its plans to better accommodate the recommendations of the Sector Plan and compatibility with the Capital Crescent Trail and the adjoining residential neighborhood, to provide more specific evidence regarding how the proposed traffic signal would affect conditions on this stretch of Arlington Road, particularly on Saturdays and Sundays, and to provide evidence as to whether the owner of the Bradley Shopping Center would be willing to cooperate in obtaining approval for and installing a traffic signal. On remand, the Hearing Examiner shall also further consider the question raised by the People's Counsel as to whether Section 59-C-7.15(b) requires a 100-foot setback from the rear property line abutting the Capital Crescent Trail.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council